COURT, U. S.
No. 73-1340

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MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE GERSTENSLAGER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The court of appeals did not issue an opinion. The decision and order of the National Labor Relations Board (Pet. App., pp. 11-50) are reported at 202 NLRB No. 40.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1973 (Pet. App., pp. 9-10). The petition for a writ of certiorari was filed on March 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company failed to bargain in good

faith, and thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

STATEMENT

A. The Board's Findings of Fact

The Union[1] has represented the Company's hourly-paid production workers since 1941 (Pet. App., p. 16; A. 280, 289).[2] The Company and Union have executed a series of collective bargaining agreements, the most recent of which expired on April 4, 1971 (Pet. App., p. 17; A. 109).

Pursuant to the Union's notice, the parties met on February 10, 1971[3], to begin negotiating a new agreement (Pet. App., p. 17; A. 109-110). At that time, the Union presented 91 proposed modifications of the existing contract, and, on February 17, the Company countered with 30 of its own proposals (Pet. App., pp. 18-19; A. 150). On April 4, immediately following expiration of the contract, the Union went on strike. Although the parties had met approximately 12 times prior to the strike, major issues still separating the parties were the union shop, the use of working foremen, and subcontracting (Pet. App., p. 21; A. 125-126).

During the strike, the parties continued to negotiate and the Company continued operations by hiring permanent replacements for the strikers (Pet. App., p. 22; A. 238-239). On August 4, the parties conducted an "in depth" review of the bargaining, in a session characterized by "give and take" on both sides. On August 6, the Company issued a document entitled "Status of Negotiations", which listed 6 Company, 20 Union, and 5 "joint"

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[1]International Union Allied Industrial Workers of America AFL-CIO, Amalgamated Local No. 813.

[2]"A." refers to the appendix to the briefs in the court below.

[3]All dates refer to 1971 unless otherwise specified.

proposed changes in the old contract as having been agreed upon by both parties. The document further indicated that 53 proposals were still on the table. (Pet. App., pp. 23-25; A. 241-242; G.C. Exh. 10.)

On August 30, the Union offered to end the strike if all the strikers were recalled. After the Company rejected the offer, the Union requested that the Company state its position on reinstatement of the strikers (Pet. App., p. 25; A. 141, 159-160). The Company replied by letter dated September 15, which stated:

> 1. If the Union * * * offers unconditionally to call off the current strike, the Company will, when openings become available, take back the presently striking employees in line of strict "time" seniority.* * *
>
> 2. In the event of a subsequent layoff, the Company will consider all employees, then working, for layoff purposes, to be of equal seniority. The Company will put into effect a rating system, the details of which have not been definitely worked out, whereby each plant worker will be rated by his supervisor and one other Company official at periodic intervals. The rating will be based primarily on the individual's productivity. In a layoff, the least productive according to the last ratings will be laid off. [Pet. App., pp. 25-26; A. 297-298.]

On September 16, the Union sent the Company a letter unconditionally offering to return all strikers to work. Following the removal of all pickets on September 18, the parties held a meeting at which the Union expressed disagreement with the Company's September 15 proposal, which, in effect, abolished seniority. The Company agreed to recall strikers as vacancies occurred. (Pet. App., p. 27; A. 134, 143-144, 163, 296.)

In early October, the Company began recalling strikers in order of seniority, but it required each employee to sign a personal employment contract as a condition of reinstatement (Pet. App., p. 39, n. 27; A. 68-71). The Company did not notify the Union of this requirement nor did it discuss the contracts with the Union (Pet. App. 29; A. 71). In relevant part, the personal employment contracts stated:

> The employee acknowledges * * * that any provisions of former contracts do not apply * * * between himself and the Company, except as the same may be required by law.
>
> The employee acknowledges that his employment shall be upon the same terms and conditions as that of employees hired since April 4, 1971 * * * and that he is aware that many such terms and conditions will be further developed in the future by the Company.
>
> The employee acknowledges that * * * employees will be * * * classified as to skill and productivity * * * and that persons failing to maintain certain merit rating levels may be subject to discharge.
>
> The employee acknowledges that lay-off or recall * * * and certain other rights will be dependent upon individual merit rating rather than prior length of service. [Pet. App., pp. 27-29; A. 299-300.]

On October 12, the Company submitted entirely new proposals. In contrast to its prior offerings, which proposed changes in specific provisions of the expired contract, the Company's new proposals were, essentially, a completely new collective bargaining agreement. The Company's proposal changed or omitted 15 provisions

that had been agreed upon in the August 6 "Status of Negotiations," and contained 9 provisions advanced for the first time. Some of the new proposals were: a six year contract term with limited reopening rights after 3 years; a "working foreman" provision that would give the Company complete control in this area; and a provision that all seniority rights and rights of recall would be terminated by April 4, 1972, when, presumably, the rating system suggested in the Company's September 15 letter would be in full force and effect. (Pet. App., pp. 29-31; A. 181, 254-255, G.C. Exh. 11.)

On November 23, after fruitless objection to the Company's new proposals, the Union offered to accept either of two alternatives: (1) the old agreement with the terms to be negotiated, plus a 15-cent wage increase that had already been granted during the strike; or (2) the same, but including the agreements specified in the "Status of Negotiations" on August 6. The Company rejected both proposals. (Pet. App., p. 32; A. 251-252.)

Shortly thereafter, the Company, without informing the Union, distributed a memo to its employees that delineated new work rules in regard to attendance and stated that unexcused absences would thereafter be considered in each employee's merit rating evaluation. (Pet. App., p. 32; A. 301-302.)

On December 9, the Company submitted another draft agreement that largely reaffirmed its October 12 proposals and also more fully elaborated the details of the proposed merit rating system. Under the Company's merit rating plan, each employee would be periodically classified by job skill and rated for productivity. The employee could appeal his classification and productivity rating to a Company committee that did not include Union representation. The rating would determine the employee's wage rate and his share of the profits in a pro-

posed profit sharing plan. The plan also provided that all employees would have equal seniority, with layoffs and recall determined by productivity, and that a drop in productivity below a specified point would be cause for discharge. (Pet. App., p. 33; G.C. Exh. 16.) Upon receiving the new merit rating proposal, the Union requested permission to conduct its own job evaluation study in the plant. The Company adamantly refused this request. (Pet. App., pp. 33-34; A. 148, 249-250.)

Thereafter, negotiations ceased. The Company, however, distributed to its employees a sheet entitled the "Gersco News Letter," which stated that it was going to implement the merit rating system. The letter also explained the system in some detail and promised that full details of the plan would be distributed in the future. (Pet. App., p. 34; A. 292-295.)

B. The Decisions Below

The Board found that the Company—by withdrawing from numerous tentative agreements and offering more stringent provisions without reasonable cause, dealing directly with the employees to undermine the Union, and refusing to permit the Union to conduct a time study to evaluate Company proposals—refused to bargain in good faith, and thereby violated Section 8(a)(5) and (1) of the Act (Pet. App., pp. 41-42). The Board ordered the Company to cease and desist from the unfair labor practices found, and to bargain with the Union upon request (Pet. App., pp. 47-50).

The court below held that there was substantial evidence to support the Board's findings and conclusions. Accordingly, it enforced the Board's order. (Pet. App., pp. 9-10.)

ARGUMENT

1. Section 8(a)(5) of the Act requires an employer to bargain in "good faith" with the chosen representative of his employees. The question of good faith involves largely a factual determination based upon an appraisal of the total conduct of the parties. *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, 498-499. The Board found that, once the Company was certain that it had broken the Union's strike, its attitude toward the negotiations changed radically; abandoning its effort to negotiate a collective bargaining agreement, the Company engaged in a concerted effort to undermine and debilitate an already weakened Union. Since the court of appeals concluded that the record supported the Board's findings, petitioner's challenge to those findings presents only an evidentiary issue which does not warrant further review. See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 409-410; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488.

2. Contrary to petitioner's assertion (Pet., p. 7), the Board's decision does not fault the Company for failing to sign a contract to which it never agreed. The Board found that the Company's abrupt withdrawal from the tentative agreements coupled with its stringent new proposals was not based upon the exigencies of changing circumstances, but rather upon a "bad faith" intention to broaden the rift between the parties (Pet. App., pp. 40-41). Moreover, the Board's order does not require the Company to agree to any particular contract provisions, but only to cease and desist from "abrogating agreements and proposing more stringent provisions *without reasonable cause*" (Pet. App., p. 47, emphasis added).

Fafnir Bearing Co. v. *National Labor Relations Board*, 362 F. 2d 716, 720-722 (C.A. 2) (Pet. App., p. 8), supports, rather than detracts from, the Board's finding that the Company improperly rejected the Union's request to conduct a time study of the Company's merit rating proposal. In the instant case, as in *Fafnir*, the Board found that the Union time study was relevant and necessary to enable it intelligently to deal with the Company's new merit rating proposal (Pet. App., p. 41), and no evidence was offered to support the Company's belated claim that such a study would disrupt the plant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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